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17 Attorneys for Plaintiff and Counter-Defendant Viasat, Inc.

18 UNITED STATES DISTRICT COURT
19 SOUTHERN DISTRICT OF CALIFORNIA

20 VIASAT, INC.)	Case No. 3:16-463-BEN-JMA
21 a Delaware corporation,)	
22 Plaintiff and Counter-Defendant,)	Viasat's Opposition to Acacia's <i>Ex Parte</i>
23 v.)	Application to Continue the Upcoming
)	Final Pretrial Conference
24 ACACIA COMMUNICATIONS, INC.)	Hon. Dist. Judge Roger T. Benitez
25 a Delaware corporation,)	Hon. Magistrate Judge Jan M. Adler
26 Defendant and Counter-Claimant.)	Case Initiated: January 21, 2016
27 _____)	
28		

1 Plaintiff and Counter-Defendant Viasat, Inc. (“Viasat”) opposes Acacia’s *Ex Parte*
2 Application to Continue the Upcoming Final Pretrial Conference, Docket No. 193.
3 Acacia’s misnamed application does not actually seek a continuance at all, but instead
4 asks the Court to vacate the pretrial conference without setting a new date, thus
5 postponing the trial of this matter indefinitely. Acacia seeks to justify this extraordinary
6 relief by claiming that the Court is considering “seven pending motions, several of which
7 are potentially dispositive” (Application at 1:11), but this is not correct. Only one motion
8 before the Court can, if granted, dispose of this entire matter: Viasat’s Motion for
9 Summary Judgment on Acacia’s Counterclaim for Patent Misappropriation. This
10 straightforward motion would, if granted, eliminate the only ostensible basis for federal
11 subject matter jurisdiction, and thus would require the remand of this entire action to state
12 court. Docket No. 127-3. The remaining motions before the Court could, if granted,
13 narrow and shape the issues for trial—but issues for trial would remain. Thus, although
14 Acacia contends that it would be “inefficient and impractical” to hold the pretrial
15 conference while these motions are pending (Application at 1:17), doing so would
16 actually help the Court efficiently prepare this matter for trial, as the Court could question
17 the parties regarding any topics likely to affect their trial presentations, whether related to
18 the pending motions or not. Finally, Acacia complains of “cross-country travel by
19 several attorneys” but, having chosen out-of-state counsel, cannot be heard to complain
20 about the location of the Court. The Court should deny this application.

21 ARGUMENT

22 **I. Acacia Has Repeatedly Sought to Avoid Trial of This Matter**

23 Acacia’s Application fails to acknowledge its multiple prior requests to vacate the
24 final pretrial conference. This history has established, if nothing else, that Acacia does
25 not want to try this case. On April 24, 2018, Acacia filed its first *ex parte* application
26 seeking to vacate the pretrial conference, then scheduled for June 4. Docket No. 161.
27 The Court instead continued the pretrial hearing to August 6, 2018, and stated that “No
28 further continuances will be granted without good cause.” Docket No. 168. Nonetheless,

1 on July 9, Acacia again filed an *ex parte* application seeking to vacate the pretrial
2 conference without setting a new date. Docket No. 181. Again, the Court declined to
3 grant this relief, but later reset the pretrial conference to August 20 (Docket No. 191), and
4 then further briefly continued the hearing to avoid schedule conflicts, to its present date
5 of September 4. Docket No. 192. Today Acacia filed its third *ex parte* application,
6 seeking yet again to vacate the pretrial conference without setting a new date. Docket
7 No. 193.

8 The Court should not encourage Acacia's dilatory tactics by further extending the
9 pretrial conference date. No schedule for the pretrial hearing will satisfy Acacia, which
10 simply wants to avoid a pretrial conference and thus a trial. Viasat filed this case on
11 January 21, 2016; the parties completed discovery more than eight months ago and filed
12 motions for partial summary judgment more than six months ago; the parties have
13 already exchanged their pretrial disclosures—twice—and are ready for trial. The pretrial
14 conference should go forward, as previously ordered, on September 4.

15 **II. The Pretrial Conference Would Benefit the Parties and the Court Because**
16 **Only One Motion Pending Before the Court Could Dispose of This Action**

17 Acacia supports its request for indefinite continuance by arguing that before the
18 Court are “seven pending motions, several of which are potentially dispositive.”
19 Application at 1:11. But this statement is wrong: only one motion presently before the
20 Court would dispose of the case. Viasat's Motion for Summary Judgment on Acacia's
21 Counterclaim for Patent Misappropriation (Docket No. 127-3; Opposition, Docket No.
22 120; Reply, Docket No. 144) explains that this Court lacks jurisdiction over Count I of its
23 counterclaims for “Patent Misappropriation under 35 U.S.C. § 1, et seq.” and that,
24 because Count I is the sole asserted ground for Federal subject-matter jurisdiction, the
25 Court should—indeed, must—remand the balance of the case after dismissing Count I.
26 ViaSat's Motion for Summary Judgment on Acacia's Counterclaim for Patent
27 Misappropriation is thus not merely “potentially dispositive,” but mandatorily so. Should
28 the Court grant this motion, no other pretrial proceedings would be necessary.

1 The remaining pending motions, in contrast, are not even “potentially dispositive” of
2 this matter:

- 3 ● Acacia’s Motion for Partial Summary Judgment Regarding Damages (Docket No.
4 75; Opposition, Docket No. 103; Reply, Docket No. 109), seeks to limit Viasat’s
5 recoverable damages, but would not eliminate any liability claims;
- 6 ● Acacia’s Motion for Summary Judgment Regarding No Liability (Docket No. 83;
7 Opposition, Docket No. 106; Reply, Docket No. 122), seeks to resolve some but not
8 all of Viasat’s liability claims, and would leave all of Acacia’s claims for trial;
- 9 ● Acacia’s Motion for Summary Judgment that Viasat Lacks Trade Secret Rights
10 (Docket No. 93; Opposition, Docket No. 151; Reply, Docket No. 156), seeks to
11 remove Viasat’s trade-secret claims, but would not affect Viasat’s other claims;
- 12 ● Acacia’s Motion to Strike and Exclude Certain Opinions of Viasat’s Experts (Docket
13 No. 86; Opposition, Docket No. 138; Reply, Docket No. 148), seeks to exclude
14 certain opinions from Viasat’s experts, but would not resolve any claim;
- 15 ● Viasat’s Motion for Partial Summary Judgment Regarding Breach of Contract
16 (Docket No. 98; Opposition, Docket No. 121; Reply, Docket No. 135), seeks a
17 finding of liability against Acacia on Viasat’s contract claims, but leaves Viasat’s
18 trade-secret claims and damages on all claims for trial; and
- 19 ● Viasat’s Motion to Exclude Expert Testimony (Docket No. 127-5; Opposition,
20 Docket No. 119; Reply, Docket No. 141), seeks to exclude certain opinions from
21 Acacia’s experts, but would not resolve any claim.

22 No combination of rulings on these motions would or could prevent a trial of this matter.
23 Despite this, Acacia argues that “both the Court and the parties will benefit from
24 continuing the Final Pretrial Conference until after the Court resolves the pending
25 motions.” Application at 1:20-22. Acacia is wrong: both the parties and the Court will
26 benefit from a pretrial conference whether or not these motions are still pending, because
27 a conference would give the Court the ability to question the parties regarding any topics
28 likely to affect their trial presentations, whether related to the pending motions or not.

Viasat thus respectfully submits that the pretrial conference should go forward as scheduled, on September 4, 2018, unless the Court first grants Viasat's Motion for Summary Judgment on Acacia's Counterclaim for Patent Misappropriation and remands the case to state court.

III. The Convenience of Acacia's Counsel Carries No Weight

Finally, Acacia argues that the Court should not hold the scheduled pretrial hearing because it would be "inefficient" for it to pay for "cross-country travel by several attorneys." Application at 1:17-18. The Court can and should quickly dismiss this argument. Convenience of litigation counsel receives little weight, and Acacia cannot create its own prejudice by hiring out-of-state attorneys for a case before this Court and then argue that it would suffer by sending them to argue in this Courthouse. *Cf., e.g., Shinde v. Nithyananda Found.*, No. 13-363, 2015 WL 12778434, at *3 (C.D. Cal. May 21, 2015) (convenience of counsel receives little weight in deposition locations); *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1195 (S.D. Cal. 2007) (same regarding venue). Furthermore, as Viasat has already explained, unless the Court remands this matter to state court, a pretrial conference is certain to be necessary, sooner or later. The question is not whether Acacia's counsel should have to travel to San Diego to attend it, but rather when.

CONCLUSION

For the foregoing reasons, the Court should deny Acacia's *ex parte* application. Although Viasat continues to believe that the Court should grant Viasat's Motion for Summary Judgment on Acacia's Counterclaim for Patent Misappropriation and remand the case to state court, if it does not do so before the pretrial hearing on September 4, that hearing should go forward as previously ordered by this Court.

Date: August 28, 2018

/s/ Kenneth M. Fitzgerald

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Date: August 28, 2018

/s/ *Kenneth M. Fitzgerald*